

No. 49176-1-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

LOUIS JOE LASACK,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 15-1-03183-1  
The Honorable James Orlando, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in failing to give Louis Lasack's proposed instructions on the statutory defense of uncontrollable circumstances.
2. The trial court violated Louis Lasack's constitutional right to due process of law and to a jury trial by refusing to instruct the jury on an available affirmative defense.
3. Any future request by the State for appellate costs should be denied.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where Louis Lasack's testimony supported his theory that the charged bail jump was the result of circumstances beyond his control, was he entitled to have the jury instructed regarding this statutory defense? (Assignments of Error 1 & 2)
2. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs because Louis Lasack does not have the ability to pay costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 3)

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Louis Joe Lasack by Amended Information with one count of robbery in the second degree (RCW 9A.56.190, .210) and two counts of bail jumping (RCW 9A.76.170). (CP 16-17) The trial court dismissed one count of bail jumping after the State failed to present any evidence related to that charge. (CP 55; 2RP 182)<sup>1</sup> The trial court denied Lasack's request to include an affirmative defense instruction for the remaining bail jump charge. (CP 19; 2RP 200-01; 3RP 211-12, 213-14)

The jury found Lasack guilty. (3RP 246-47; CP 52, 54) The trial court imposed a standard range sentence totaling six months, and imposed only mandatory legal financial obligations. (4RP 259; CP 63, 65) Lasack filed a timely notice of appeal. (CP 73)

#### **B. SUBSTANTIVE FACTS**

Robin Alexander is an asset protection officer at the Spanaway Walmart store. (2RP 58-59) As part of her job, she observes customer activities through cameras installed in the ceiling throughout the store. (2RP 60-61) Around 5:00 AM on

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<sup>1</sup> The transcripts from trial, labeled volumes I through IV, will be referred to by their volume number (#RP). The April 21, 2016 hearing transcript is not referred to in this brief.

August 13, 2015, she observed a man walk into the store and make his way through the apparel section to the craft section. (2RP 65-66) He then went to the hardware section, where he browsed items on the shelves. (2RP 66) Alexander saw the man take two tubes of caiking and a paintbrush off a shelf and place them into a pocket of his cargo pants. (2RP 66, 69) She then watched as he went to the automotive section, removed more items off a shelf, and place them in his pocket. (2RP 68, 69, 71) The man then walked towards the front of the store and past the registers without paying for the items. (2RP 71, 72)

Alexander notified the overnight manager, then pursued the man. (2RP 71) Alexander caught up to the man just outside the store. (2RP 74) She placed her hand on his arm and identified herself as store security. (RP4 74) According to Alexander, the man turned and raised a large, black flashlight over his head. (2RP 75, 78) Concerned that the man would strike her, Alexander put her hands up and said “come on.” (2RP 75, 78) The man looked around, then ran through the parking lot to a parked car. (2RP 75, 78)

According to overnight manager Lauifi Tuitoelau, the man also tried to push Alexander out of the way so he could get into the

car. (2RP 27, 36-37) Tuitoelau decided to intervene out of concern for Alexander's safety. (2RP 43-44) Tuitoelau grabbed the man and took him to the ground, where he stayed until law enforcement officers arrived. (2RP 52, 146)

Pierce County Sheriff's Deputies Christopher Groat and Tommie Nicodemus contacted the man and identified him as Louis Lasack. (2RP 146, 149, 170) During a search incident to arrest, the officers located tubes of caulk, caster wheels and a box of ziploc baggies. (2RP 149, 152, 171) The Deputies also found a large flashlight nearby. (2RP 154, 176) When questioned, Lasack acknowledged that he took items from the Walmart store. (2RP 152, 172, 174)

Deputy prosecuting attorney Sean Waite testified that Lasack had a pretrial hearing scheduled for December 29, 2015 at 1:30 PM. (2RP 102) Lasack did not respond when his name was called at 1:33 PM and 2:55 PM. (2RP 106)

Lasack testified that he did not strike or threaten Alexander. (2RP 184) He testified that he was grabbed and choked, and lost consciousness. (2RP 184, 185) He did not take any items from Walmart without paying for them, and did not know how the items got into his pockets. (2RP 192-93) He also testified that he was

unable to get to the courthouse for the December 29<sup>th</sup> hearing because his car radiator blew up. (2RP 187-88)

#### **IV. ARGUMENT & AUTHORITIES**

A. THE TRIAL COURT VIOLATED LASACK'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A JURY TRIAL BY REFUSING TO INSTRUCT THE JURY ON HIS AFFIRMATIVE DEFENSE.

Under both the federal and state constitutions, an accused person has a right to due process of law. U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Based on principles of due process, an accused person has the right to have the “jury base its decision on an accurate statement of the law as applied to the facts in the case.” State v. Miller, 131 Wn.2d 78, 91, 929 P.2d 372 (1997). Moreover, a criminal defendant is “entitled to have the jury fully instructed on the defense theory of the case.” State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994); State v. Agers, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

Lasack was “entitled to have the jury instructed on his theory of the case if there [was] evidence to support that theory.” State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Failure to do so is reversible error. State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d

265 (1983).

In evaluating the evidence, the trial court must view it in the light most favorable to Lasack. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). “The trial court is justified in denying a request for [an affirmative defense] instruction only where no credible evidence appears in the record to support [it].” State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

The question of whether the defendant has produced sufficient evidence to raise an affirmative defense is a matter of law for the trial court, and is reviewed *de novo*. State v. Fisher, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016) (citing Janes, 121 Wn.2d at 238).

RCW 9A.76.170(1) defines the crime of bail jumping.<sup>2</sup> RCW 9A.76.170(2) provides an affirmative defense to a bail jumping charge when the defendant can prove that “uncontrollable circumstances prevented the person from appearing[.]”<sup>3</sup> RCW

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<sup>2</sup> RCW 9A.76.170(1) states in part: “Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state... and who fails to appear ... as required is guilty of bail jumping.”

<sup>3</sup> RCW 9A.76.170(2) states: “It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.”

9A.76.010(4) defines “[u]ncontrollable circumstances” as “an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.” See also WPIC 19.17.

The trial court refused Lasack’s request for the uncontrollable circumstances instruction, stating: “There is a legal standard you have to meet in that instruction itself... I don’t think you just automatically get that instruction for the alleged defense without meeting the legal standard set forth ... there is no testimony presented that any of those contemplated circumstances would have existed, so I don’t think you get the instruction regarding the defense.... I don’t think it would be appropriate to give the defense the instruction when there is no factual basis that would support it.” (2RP 200-01)

The trial court’s refusal was error. Lasack presented sufficient evidence to show uncontrollable circumstances. He testified that as he was leaving his neighborhood to go to the court

hearing, his radiator blew up. (2RP 187, 188) He lives 17-20 miles from the courthouse, and did not have appropriate clothing to walk to court on a cold December day. (2RP 188, 197) He also did not have money to take a bus. (2RP 201) He tried to fix his car until he finally procured a ride so he could come to court to quash the warrant. (2RP 187)

Rather than letting the jury decide whether this evidence met the legal standard for the affirmative defense, the trial court improperly substituted its own judgment and determined that Lasack could have tried harder to come to court.<sup>4</sup> Whether car trouble and lack of money for the bus was an uncontrollable circumstance such that it amounted to an affirmative defense was a question of fact that should have been resolved by the jury. Cf. Williams, 132 Wn.2d at 259 (reversing conviction where trial court refused to give duress instruction where court believed evidence did not establish threat of immediate harm). Certainly reasonable minds – based upon their individual experiences – could differ as to whether such car trouble amounts to an uncontrollable circumstance. By making this factual determination for the jury, the

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<sup>4</sup> “[I]n evaluating the adequacy of the evidence [to support the proposed affirmative defense instruction], the court cannot weigh the evidence.” State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998).

trial court violated Lasack's right to due process of law and a jury trial. Reversal is thus required. Agers, 128 Wn.2d at 93.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.<sup>5</sup>

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is "a matter of discretion for the appellate court," which may "decline to order costs at all," even if there is a "substantially prevailing party." Nolan, 141 Wn.2d at 628.

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<sup>5</sup> In State v. Sinclair, Division 1 concluded a defendant should object to the imposition of appellate costs in the opening brief. 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). More recently, in State v. Grant, this Court disagreed with Sinclair and held that an appellant should object to the imposition of costs through a motion to modify a commissioner's ruling ordering costs. 2016 WL 6649269 at \*2 (2016). But Lasack has included an objection to costs in this brief in the event that a higher court adopts the Sinclair reasoning at a future time, and because this Court also noted in Grant that "a defendant may continue to properly raise the issue of appellate costs in briefing or a motion for reconsideration consistently with Sinclair." 2016 WL 6649269 at \*2.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Lasack’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Lasack is homeless, has no savings, and has no job and no income. (CP 75-76; 4RP 256-58) And the trial court declined to order any non-mandatory LFOs at sentencing in this case after finding that Lasack was unlikely to have the ability to repay such costs. (CP 63; 4RP 259) Thus, there was no evidence below, and no evidence on appeal, that Lasack has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Lasack is indigent and entitled to appellate review at public expense. (CP 79-80) This

Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). See also State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) (noting that "if someone does meet the GR 34 standard for indigency, courts

should seriously question that person's ability to pay LFOs)".

Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Lasack's financial situation has improved or is likely to improve. Lasack is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

#### **V. CONCLUSION**

Lasack was entitled to present his defense to the jury, have the trial court so instruct the jury, and let the jury determine the success or failure of his defense. This court should reverse the trial court's decision to refuse Lasack's request for an "uncontrollable circumstances" instruction, and remand for a new trial. And this Court should decline any future request to impose appellate costs.

DATED: December 12, 2016



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Attorney for Louis Joe Lasack

#### **CERTIFICATE OF MAILING**

I certify that on 12/12/16, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Louis Joe Lasack #2016182038, Pierce County Jail, 910 Tacoma Ave. S., Tacoma, WA 98402.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**December 12, 2016 - 12:53 PM**

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